§ B.3(a) (2006), which is exactly what occurred. That express modification provision in the *Adelphia Order* stands in stark contrast to the *HDO*, further supporting a mandatory, jurisdictional reading of the *HDO*. *See supra* p. 15. Furthermore, Defendants fail to note that the Bureau itself dutifully abided by the 120-day deadline for *its* review of the arbitration award in the *Adelphia* proceeding, which refutes the assertion the Bureau adopted a mandatory reading of such deadlines only for this *HDO*. *See* Order on Review, *TCR v. Time Warner Cable Inc.*, DA 08-2441, ¶ 3 n.12 (MB rel. Oct. 30, 2008).[10]

Third, Defendants contend (at 15) that, because the Commission did not adopt across-the-board time limits on ALJs in broadcast hearings, the Bureau's interpretation of the *HDO* is improper. But, as explained, the order cited by Defendants (at 15 n.61) confirms the Commission's authority to impose time limits on ALJs. *See supra* p. 8. Furthermore, the contrast between the discretionary language in that order and the mandatory language here supports, not undermines, the Bureau's interpretation of the *HDO*. Because it is well-established that the Commission (and thus the Bureau) may regulate the ALJ decisional process and because an ALJ's "independence" does not empower an ALJ to disregard decisions of the delegating agency, Defendants are wrong in suggesting (at 15-16) that a jurisdictional reading of the *HDO* conflicts with the ALJ's independence. Besides, nothing in the *Jurisdiction Order* interferes with the independence of the ALJ as the matters are now back before the Bureau – which is equipped to resolve carriage complaints – and the ALJ will have no further role in the process.

Finally, Defendants argue (at 17-18) that the text of the *HDO* makes it "readily apparent that the 60-day deadline . . . was discretionary rather than mandatory" based on case law

[10] Defendants also argue (at 14-15) the Bureau's interpretation is "inconsistent" with the interpretation of a "similar deadline" by the Wireline Competition Bureau in the universal service context. But the intent of one bureau in an entirely different statutory context sheds no light on the proper interpretation of the *HDO* by the Bureau.

involving congressional deadlines on agency actions. Those decisions differ fundamentally from the circumstances here. To begin with, as the Supreme Court has said, "when a power is conferred for a limited time, the *automatic* consequence of the expiration of that time is the expiration of the power." *Peabody Coal*, 537 U.S. at 159 n.6 (internal quotation marks and alterations omitted). The question in those cases, however, is whether a court should ascribe to Congress (as a delegating entity) an intent that a power is conferred only for a "limited time" such that a failure to meet a deadline divests the agency of authority. Here, in contrast, the Bureau – the delegating entity – has made clear its intent. *See Jurisdiction Order* ¶ 16. That understanding of the intended effect of the *HDO*, as explained above, is more than reasonable in light of this Commission's precedent establishing an ALJ has no authority to countermand mandatory decisions in a designation order, in view of the underlying congressional command that carriage proceedings be resolved expeditiously, and based on the text and context of the *HDO* itself. *See supra* pp. 13-15. Nothing in the cases cited by Defendants supports a categorical rule foreclosing that interpretation. *See Brock v. Pierce County*, 476 U.S. 253, 262 n.9 (1986) (refusing to "hold that a statutory deadline for agency action can never bar later action unless that consequence is stated explicitly").

The decisions cited by Defendants are also inapposite because they are animated by a concern that, if an agency were divested of jurisdiction, important public concerns would go unaddressed. *See Brock*, 476 U.S. at 260 (courts should be hesitant to conclude Congress intended divestiture of jurisdiction when "important public rights are at stake" and there "are less drastic remedies available" to compel action via mandamus); *Gottlieb v. Peña*, 41 F.3d 730, 735 (D.C. Cir. 1994) (noting that, although Congress was "concerned about . . . lengthy delays," "it is clear as well that Congress' ultimate concern was that appropriate relief be provided"); Order,

1993 Annual Access Tariff Filings, 19 FCC Rcd 14949, ¶ 24 (2004); *see also Peabody Coal*, 537 U.S. at 159 n.6 (finding jurisdictional reading "would thwart the statute's object and relieve the respondent companies of all responsibility"). No such dire consequences attach to a jurisdictional reading of the *HDO*: the complaints will be resolved regardless whether the *HDO* is jurisdictional. The only question is whether that resolution will be aided by a recommended decision of an ALJ or decided by the Bureau, which has fact-finding capabilities. There is thus no need to read the mandatory language of the *HDO* as anything other than mandatory.

IV. DEFENDANTS' DUE PROCESS ARGUMENTS ARE WITHOUT MERIT

A. The Bureau Has Ample Tools To Adjudicate These Disputes

Given the nature of the disputes, neither live testimony nor discovery is necessary to resolve the remaining factual issues. But even if the Bureau were to decide otherwise, it has a host of procedural tools at its disposal to adjudicate the disputes, including the authority to hear live testimony and to make credibility determinations, as Defendants urge. As noted, the Bureau "acts for the Commission under delegated authority, in matters pertaining to multichannel video programming distribution," 47 C.F.R. § 0.61, and such authority extends to "[p]rogram access and carriage," *Id.* § 0.61(f)(7). Commission rules further make clear that the Commission may utilize any discovery tools it deems appropriate and that the Commission (and hence the Bureau) – not just an ALJ – can conduct evidentiary hearings.[11] Defendants' assertion (at 19) that the Bureau "is not authorized and does not have the tools to decide credibility based on witness demeanor during live testimony" is therefore simply false.[12]

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[11] *See* 47 C.F.R. § 76.7(e)(1) ("The Commission may specify other procedures, such as oral argument or evidentiary hearing directed to particular aspects, as it deems appropriate."); *id.* § 1.241(a) ("Hearings will be conducted by the Commission, by one or more commissioners, or by a law judge designated pursuant to section 11 of the Administrative Procedure Act.").

[12] The Bureau thus rightly noted in the *Jurisdiction Order* that it has a host of procedural tools to resolve any outstanding factual disputes. *See Jurisdiction Order* ¶ 18 n.57.

The Commission's decision in *Fox Television Stations, Inc.* is illustrative. *See* Memorandum Opinion and Order, *Fox Television Stations, Inc.*, 10 FCC Rcd 8452 (1995). In that case, the Bureau determined that "candor" was *the* core issue in a license renewal application and decided to conduct an "informal investigation" of the circumstances surrounding the Commission's prior approval of an application to acquire the stations in question. *Id.* ¶ 24. Bureau personnel took sworn testimony from 17 witnesses and interviewed and obtained written statements from 12 present and former Commission employees, all within the span of approximately 60 days. *See id.* ¶ 25. Based on the Bureau's investigation, the full Commission determined that it was not necessary to conduct a full hearing and approved the Fox renewal application by memorandum opinion and order. *See id.*; Second Memorandum Opinion and Order, *Fox Television Stations, Inc.*, 11 FCC Rcd 5714 (1995). The same procedures deployed by the Bureau in *Fox* are fully available here.

B. Defendants' Reliance on the *Second Report and Order* Is Misplaced

Defendants concede (at 21) that 47 C.F.R. § 76.7(g) commits ALJ referral to the Bureau's sole "discretion." Even so, that discretion is "necessarily cabined," Defendants contend, by language in the *Second Report and Order* that allegedly requires the Bureau to refer the disputes to an ALJ. Defendants are mistaken on two counts.

First, the terms of the *Second Report and Order* are no different from § 76.7(g) in giving the Bureau discretion whether to refer all or part of a carriage proceeding to an ALJ. Under the *Second Report and Order*, where the existing record is not sufficient to resolve the complaint and grant relief, the Commission staff can either "determine and outline the appropriate procedures for discovery," or will "refer the case to an ALJ for an administrative hearing." *Second Report and Order* ¶ 31; *see Jurisdiction Order* ¶ 5. Thus, nothing in the *Second Report and Order* "cabin[s]" the Bureau's discretion as Defendants claim.

More fundamentally, Defendants' reliance on the *Second Report and Order* ignores the context of that order. The legal effect of the *Second Report and Order* was to amend 47 C.F.R. § 76.1302 of the Commission's rules governing carriage disputes. *See Second Report and Order* ¶ 40 (ordering the amendment of 47 C.F.R. § 76.1302 as set forth in Appendix C). Yet the rules set forth at § 76.1302 that the Commission was interpreting in the *Second Report and Order* have since been amended, and all provisions regarding ALJ referral were removed and consolidated in § 76.7.[13] Accordingly, the provisions set forth at § 76.7 – *not* § 76.1302 or the *Second Report and Order*'s interpretation of those regulations – dictate the ALJ referral procedures for this proceeding. This is critical, for Defendants themselves concede (at 21) that the newly consolidated rules make ALJ referral entirely discretionary: the staff "*may, in its discretion,*" refer a dispute to an ALJ for full or partial adjudication, but it is never required to do so.[14] Defendants have no explanation for how a Commission order interpreting a prior version of regulations that now, in their amended form, concededly commit ALJ referral to the Bureau's discretion could somehow "cabin[]" that discretion.[15]

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[13] *See* 47 C.F.R. § 76.1302 (setting forth procedural rules regarding complaints and complaint contents, prefiling notice, responsive pleadings, time limits, and remedies and sanctions, but *omitting* sections amended by the *Second Report and Order* regarding "discovery" – previously at § 76.1302(g) – and "referral to administrative law judge" – previously at § 76.1302(m)); *see also* 64 Fed. Reg. 6565, 6574-75 (Feb. 10, 1999) (streamlining procedures for referral to an ALJ and promulgating current version of § 76.1302 without provisions for discovery or ALJ referral).

[14] *See* 47 C.F.R. § 76.7(f)(2) (noting that the Commission staff "*may* advise the parties that the proceeding will be referred to an administrative law judge") (emphasis added); *id.* § 76.7(g) ("[T]he Commission staff may, in its discretion, designate any proceedings or discrete issues arising out of any proceeding for an adjudicatory hearing before an administrative law judge.").

[15] Moreover, those same regulations provide that the Commission staff may "in its discretion" order discovery that "may" include depositions. Thus, even if it were the case that the Bureau lacked the authority to hold an evidentiary hearing in its exercise of the full powers of the Commission – which, as noted, it can (and does) do under its delegated authority – it could at a minimum order videotaped depositions at which all parties would have a full opportunity to cross-examine witnesses, and from which the Bureau could make the credibility determinations Defendants seek.

C. Defendants' Due Process Claims Are, at Best, Premature

Because the Bureau has a full complement of discovery and procedural tools at its disposal, Defendants' arguments regarding a "trial-type hearing" necessarily fail at the threshold, for it remains to be seen what process will be accorded the parties now that the Bureau has jurisdiction.[16] As explained at Part I, *infra*, this fact reveals the Application for what it is: an improper interlocutory appeal proscribed by § 76.10(a).

D. In All Events, Due Process and the Appearance of Justice Do Not Require a "Trial-Type Hearing"

Even if the Bureau (or the Commission, making its ultimate determination) had already made clear what process will be afforded to the parties, Defendants' insistence on a "trial-type hearing" fails for a final reason: due process does not require it here. The determination as to what process is constitutionally due is subject to a familiar balancing test that weighs the strength of the private interest affected, the risk of an erroneous deprivation of rights, and the cost of providing additional process.[17] The Supreme Court noted in *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970), cited by Defendants, that the process provided "must be tailored to the capacities and circumstances of those who are to be heard."[18] Thus, in *Goldberg*, the Court found that welfare recipients must be given an opportunity to present evidence orally at a hearing and to

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[16] *See, e.g., Fox v. District of Columbia*, 83 F.3d 1491, 1496 (D.C. Cir. 1996) (due process claim was not ripe where there was strong reason to believe that agency would waive limitations period for appeal and avail employee of process of which he claimed to be due); *Cronin v. FAA*, 73 F.3d 1126, 1131 (D.C. Cir. 1996) (claims of airline pilot and labor organizations that FAA's alcohol and drug testing regulations did not afford due process were not ripe where it was uncertain whether any employees would suffer adverse actions without benefit of due process, and there were already several procedural systems in place to address such claims). *See generally Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

[17] *See Mathews v. Eldridge*, 424 U.S. 319 (1976).

[18] *See also Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961) ("(D)ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.") (internal quotation marks omitted).

cross-examine adverse witnesses because many such recipients can neither write effectively nor obtain professional assistance.[19] But those circumstances are plainly absent here. Tellingly, Defendants do not cite any other case, before the Commission or otherwise, in which the lack of opportunity to cross-examine witnesses was deemed constitutionally defective. To the contrary, it is well established that, even where there are disputed issues of material fact, an agency need not conduct an evidentiary hearing if those issues can be adequately resolved on the written record.[20]

Such is the case here: the few remaining factual issues are narrow in focus, and any credibility determinations to be made are quite limited both in their scope and in their possible relevance to the Commission's ultimate legal determination.[21] As the Bureau made clear in the *HDO*, resolution of the disputes will turn on legal, economic, and technical considerations such as the legal meaning of contract terms, the market-reasonableness of the fees Complainants demanded during negotiations, as well as issues of bandwidth capacity and consumer demand.[22] Resolving those types of issues does not require an evidentiary hearing under well-established

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[19] *See* 397 U.S. at 268-69.

[20] *See Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993) (citing cases).

[21] Defendants suggest otherwise and cite (at 5) statements by the ALJ that "the credibility of several witnesses will be at issue." *November 20 Order* ¶ 7 & n.8. But they are notably silent as to what those issues are. For instance, in the MASN matter, the Bureau has already determined that MASN's complaint is "forward-looking" and concerns Comcast's conduct *after* execution of the affiliate agreement. *See HDO* ¶¶ 106-107. The Bureau similarly rejected Comcast's contention that MASN has somehow waived its statutory program carriage rights by executing the affiliate agreement. *See id.* ¶ 105. Thus, it is unclear what legal effect the parties' disagreement about the negotiations leading up to that agreement could have.

[22] *See id.* ¶¶ 20-23 (setting forth issues relating to "Business and Editorial Justifications" for non-carriage), 31-34 (same), 43-45 (same), 55-56 (same), 79-84 (same), 86-89 (setting forth issues relating to "Financial Interest"), 112-118 (setting forth issues relating to "Contract-Based, Business and Editorial Justifications" for non-carriage).

case law[23] – particularly where, as here, there are compelling reasons for expedition.[24]

Nor does Defendants' position square with longstanding precedent. It is well established that an agency may make credibility determinations without hearing live testimony and that an agency is not bound by an ALJ's credibility determinations.[25] Thus, the risk of an erroneous deprivation is slight, because the Commission, exercising ultimate review, can lawfully disregard the ALJ's conclusions in any event. Moreover, because both the Commission and the Bureau acting under delegated authority can hold evidentiary hearings, it is unclear at this point in the proceedings what purpose additional process via ALJ referral would serve.[26]

E. Due Process and the Appearance of Justice Are in Fact Best Served by Bureau Adjudication of the Disputes

In light of the circumstances outlined above, Defendants get things precisely backwards: in reality, Bureau adjudication is the best way to ensure that due process requirements are met. The Bureau – with its large staff – has greater resources than the single remaining ALJ to ensure full and fair (and prompt) adjudication prior to rendering a decision. And, while Defendants

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[23] *See, e.g., Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364 (D.C. Cir. 1998) (agency not required to conduct hearing when it resolves dispute over market power); *Wisconsin v. FERC*, 104 F.3d 462 (D.C. Cir. 1997) (no hearing required to resolve conflicts about meaning of contract or economic issues); *SBC Communications Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995) (no hearing required to resolve disputes about market structure and competitive effects).

[24] *See, e.g., CMC Real Estate Corp. v. ICC*, 807 F.2d 1025, 1032 (D.C. Cir. 1986) ("[t]he benefit of avoiding the expense and delay of a trial-type hearing outweighed the slight increase in probative value that cross-examination would have afforded for purposes of due process").

[25] *See, e.g., Hameetman v. City of Chicago*, 776 F.2d 636, 644 (7th Cir. 1985) ("Administrative agencies are . . . allowed to make findings on issues of credibility without taking live testimony."); *Moore v. Ross*, 687 F.2d 604, 609 (2d Cir. 1982) ("We have never held that due process was violated in federal administrative proceedings because agencies made de novo credibility determinations based only on the paper record."); *see also Moore v. Dubois*, 848 F.2d 1115, 1118 (10th Cir. 1988) (noting "substantial authority" for the proposition that "in administrative proceedings decision makers do not violate due process when they reject the findings of hearing examiners without personally hearing and observing the key witnesses").

[26] *See, e.g., RKO Gen., Inc. v. FCC*, 670 F.2d 215, 231 (D.C. Cir. 1981) (noting "the FCC was not required to designate the candor issue and reopen the proceeding for an evidentiary hearing that would have served no purpose").

make much (at 4, 23) of the ALJ's conclusion that hearing all six disputes over the course of eight days of hearings is "ludicrous," that merely illustrates the point: as the ALJ acknowledged in his *November 20 Order*, it would be a difficult task for a single ALJ to render a recommended decision on six disputes within an expedited time frame required by the statute.[27]

Nor is the original 60-day deadline unrealistic or, in Defendants' words (at 23), "farcical." The Commission has in the past ordered that similar – and arguably far more complicated – program carriage complaints be resolved within that timeframe.[28] Finally, because Bureau adjudication of the disputes makes practical sense, it will bolster, rather than undermine, the appearance of justice.[29] The Bureau has already carefully reviewed the complaints and made factual findings incidental to its determination that the Complainants have each established a *prima facie* case of discrimination. By contrast, the ALJ must start anew. The Bureau is thus far better equipped to identify any further factual questions that must be resolved in determining whether Defendants discriminated on the basis of affiliation.

CONCLUSION

The Emergency Application for Review should be denied.

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[27] *November 20 Order* ¶ 7 & n.10.

[28] *See, e.g., MASN Order.*

[29] The supposed "mischaracterizations" that Defendants assert (at 22-23) create an appearance of injustice are all, upon further inspection, nothing of the sort. As noted, the *HDO does* impose a jurisdictional 60-day deadline – and the Bureau's interpretation of its own order is, in any event, entitled to deference. *See supra* p. 13. Moreover, the *HDO* does not, as Defendants suggest, mischaracterize the factual questions that remain outstanding; rather, the *HDO* is clear that its time-bound delegation of authority to the ALJ does not include the procedural and other issues definitively resolved therein. Finally, and relatedly, the ALJ *did* expand the issues by declaring that he would review all issues *de novo* and would decline to grant any weight to the Bureau's findings that each complainant had established a *prima facie* case of discrimination.

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